TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

No. 429.

THE UNITED STATES, APPELLANT,

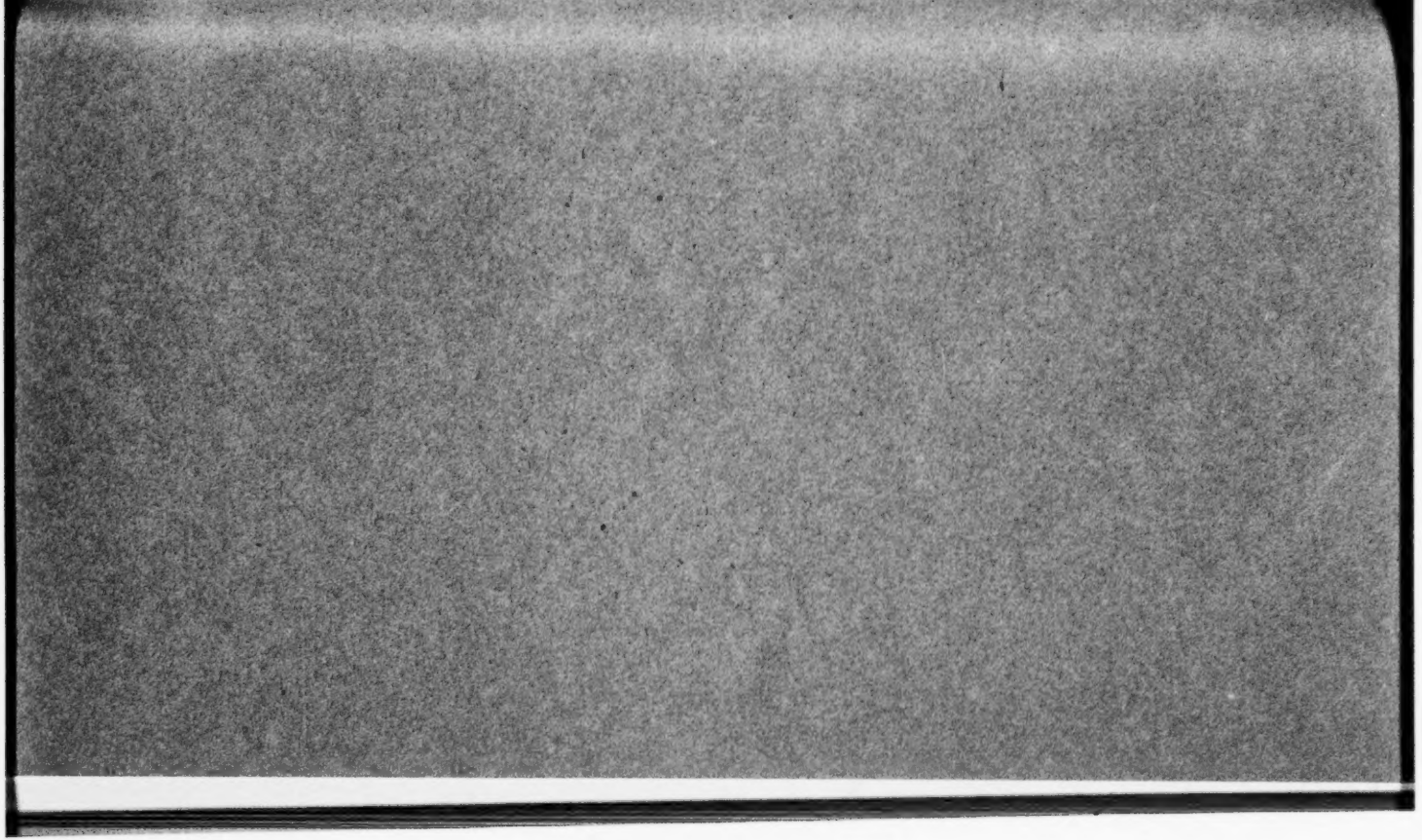
vs.

THE STATE OF TENNESSEE, THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED JUNE 13, 1922.

(28979)



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INDEX.

	Original.	Print.
Petition for appeal	93	1
Assignment of errors	95	1
Order allowing appeal	99	4
Praecipe for transcript	101	5
Citation and service	102	5
Clerk's certificate	103	6
Citation and service	104	6
Designation to omit parts of record and consent thereto	107	7

93 United States District Court, Middle District of Tennessee, Nashville Division.

THE STATE OF TENNESSEE; THE RAILROAD AND Public Utilities Commission of Tennessee, composed of B. A. Enloe (chairman), Harvey H. Hannah, and Julian H. Campbell, commissioners; and The State of Tennessee, on Relation of the Railroad and Public Utilities Commission of Tennessee, petitioners, *v.* UNITED STATES OF AMERICA, RESPONDENT, and INTERSTATE COMMERCE COMMISSION, INTERVENING respondent.	In Equity, No. 83.

Petition for appeal.

(Filed May 13, 1922.)

United States of America, respondent, and Interstate Commerce Commission, intervening respondent, feeling themselves aggrieved by the final order or decree of the District Court entered April 24, 1922, pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein the respondent and intervening respondent consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

94 And the respondent and the intervening respondent pray that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

LEE DOUGLAS,
United States Attorney, Middle District of Tennessee.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
P. J. FARRELL,
J. CARTER FORT,
Solicitor for Interstate Commerce Commission.

95 United States District Court, Middle District of Tennessee, Nashville Division.

Assignment of errors.

(Filed May 13, 1922.)

United States of America, respondent, and Interstate Commerce Commission, intervening respondents; now come, by their respective counsel, and in connection with their petition for appeal, file the fol-

lowing assignment of errors on which they will rely on their app to the Supreme Court of the United States from the final order decree of the District Court entered April 24, 1922, in the abo entitled cause.

The District Court erred:

I. In overruling the motion of the United States to dismiss petition and in not sustaining the motion.

II. In overruling the motion of the Interstate Commerce Co mission to dismiss the petition and in not sustaining the motion.

III. In not holding and adjudging that the Interstate Comme Commission on the record of the evidence and proceedings before had the power and authority to make and enter the order: that order rested on substantial evidence and that the qu
96 tions sought to be raised by the petition were foreclosed by findings of fact.

IV. In holding and adjudging as follows:

"Being thus convinced that the State, with or without the su port of the State commission's order, has a right to be heard as to substance of its complaint, we pass to the meritorious question."

V. In holding and adjudging as follows:

"If there had been no order by the State commission and section 22 has the scope and effect now claimed for it, the State a its municipalities would have the right to negotiate with the ra roads for the preferential treatment which section 22 contempla and to obtain such discrimination in their favor if they could. T Interstate Commerce Commission order now attacked denies th right and forbids the railroads to grant such a preference if th should wish to. It can not be controlling that at present they do n so desire; they may change their minds; and this order would sta as a deterrent both against a change of policy by the railroads ge erally and against a tendency by any one of them to break aw from the existing policy of all."

VI. In holding and adjudging as follows:

"It is the contention of the United States that when these thr sections are read together, section 22 is so modified by sections 2 a 3 that it remains for the commission to decide whether a preferen which might arise under section 22, nevertheless might involve th previously forbidden discrimination or advantage. We can not gi this construction."

VII. In holding and adjudging as follows:

"In Interstate Commerce Commission vs. Baltimore & Ohio Ra road Company, 145 U. S. 263, 278, section 22 was under considerati and it was expressly said that even in the absence of this section fr or reduced transportation for the property of the United Stat or States or municipal governments would not necessarily be an u just discrimination. This is obvious if for no other reason than b cause freight charges which are paid by the public must be in one wa or another assessed back against the public, including the railroad in the form of taxes, as well as because transportation for the publ may be exacted in partial consideration for the public rights which th

carrier has received. It can not be thought that transportation furnished to private shippers and that furnished to the public are given under substantially similar circumstances and conditions. Hence it can not necessarily follow that every discrimination is unjust. We think it should be inferred that section 22 is a legislative declaration of the fact recognized in the case just cited, and that
97 its effect is to leave the commission without jurisdiction to forbid the railroads from carrying freight for the public at a less price than it charges individuals for the same carriage of the same freight; in other words, it excludes this particular traffic from the rate structure which the commission is authorized to erect and control: in still other words, there is freedom of discrimination."

VIII. In holding and adjudging as follows:

"Of course this giving of a preference under section 22 is wholly permissive; the section does not confer upon any municipality the right to demand a preference. Nevertheless, the existence of the power is of value to the municipalities. They thereby get the right to competition in rates among the carriers for this traffic. The carriers at present do not wish to compete in this particular, but any order which prevents them from so doing whenever they may desire to operates directly to prejudice and destroy the municipal right which is recognized and preserved by section 22."

IX. In holding and adjudging as follows:

"What has so far been said leads to the conclusion that the Interstate Commerce Commission would be without authority to make an order applicable solely to interstate traffic and forbidding a preferential rate to a State or a city or county. The right of this commission to regulate or fix an intrastate rate, whether arising under the former laws or under the transportation act of 1920, is collateral and incidental to its rights to regulate interstate traffic; the branch may overhang the intrastate field only because the branch is essential to the maintenance of the tree planted in interstate soil. The incident can not exist without the principal fact to which it is collateral; the branch can not keep its position if there is no tree."

X. In holding and adjudging as follows:

"We think the Interstate Commission order should be enjoined and the State commission order should remain in force. Manifestly this result should follow only so far as the freight in question is to be carried 'for the United States, State, or municipal Governments.'"

XI. In entering the following decree, viz:

"2. That the order of the Interstate Commerce Commission in the matter of intrastate rates and charges in the State of Tennessee entered August 3, 1921, and identified on the docket of said commission as No. 12132, directing steam railroad companies to establish, put in force, and maintain rates for the transportation within the State of Tennessee of stone and gravel, in carloads, when
98 for use in the construction of public highways and consigned to Federal, State, county, or municipal authorities or their bona fide agents, in excess of rates charged by said companies on such transportation at and prior to the time of the entry of said

order, is adjudged to be void to the extent that the rates there ordered to be established, put in force, and maintained affect apply to such transportation, for the United States, State, or munic pal Government of stone and gravel, the title to which has pass to the Government or is vested in it at the point of the origin its transportation; and that to the extent that said order of the Inte state Commere Commission is hereinabove adjudged to be void, an to that extent only, it be and hereby is annulled and set aside, an the enforcement thereof be and hereby is perpetually enjoined."

XII. In entering the final decree and in not dismissing th petition.

Wherefore, respondents, and each of them, pray that the fina order or decree of the District Court, entered April 24, 1922, be re versed, annulled, and set aside, with directions that the permanen injunction shall be dissolved and the petition dismissed, and for suc other and further order as may be appropriate.

LEE DOUGLAS,
United States Attorney, Middle District of Tennessee.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
P. J. FARRELL,
J. CARTER FORT,
Solicitors for Interstate Commerce Commission.

99 United States District Court, Middle District of Tennesse

Nashville Division.

Order Allowing Appeal.

(Filed May 19, 1922.)

In the above-entitled cause, United States of America, respondent and Interstate Commerce Commission, intervening respondent, hav ing made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the Dis trict Court, entered April 24, 1922, and having also made and filed a assignment of errors, and having in all respects conformed to th statute and rules of court in such case made and provided:

100 It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to trans mit forthwith a properly authenticated transcript of the record proceedings, and papers on which said order or decree was made and entered forthwith to the Supreme Court of the United States.

A. C. DENISON,
United States Circuit Judge.
EDWARD T. SANFORD,
J. W. ROSS,
United States District Judges.

101 *Praecipe for record.*

(Filed May, 1922.)

In U. S. District Court.

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal of the United States of America and the Interstate Commerce Commission and include therein, in the order given below, the following:

1. Petition.
2. Motion of the United States to dismiss.
3. Answer of the Interstate Commerce Commission and motion to dismiss included therein.
4. Motion for hearing and order fixing February 18, 1922.
5. Petition of Illinois Central Railroad Company and two other railroad companies to intervene, and their motion to adopt as their own the motions to dismiss filed by the United States.
6. Order granting petition to intervene.
7. Order of submission of cause.
8. Opinion.
9. Decree.
10. Petition for appeal.
11. Assignment of errors.
12. Order allowing appeal..
13. Praecipe.
14. Citation.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
P. J. FARRELL,
J. CARTER FORT,
Solicitors for Interstate Commerce Commission.

Service of a copy of the foregoing praecipe is hereby acknowledged this 19th day of May, A. D. 1922.

WM. H. SWIGGART, JR.,
Solicitor for Complainant and Appellees.

102 *Citation of appeal.*

In United States District Court.

UNITED STATES OF AMERICA, *ss*:

To the State of Tennessee, the Railroad and Public Utilities Commission of Tennessee, composed of B. A. Enloe, Chairman, Harvey H. Hannah and Julian H. Campbell, Commissioners, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof pursuant to an appeal duly allowed and filed in the clerk's office of the United States District Court,

Middle District of Tennessee, wherein United States of Americ Interstate Commerce Commission are appellants and yo appellees, to show cause, if any there be, why the final or decree annulling and enjoining the order of the Interstate Com Commission entered against the appellants in the appeal men should not be corrected and why speedy justice should not be to the parties in that behalf.

Witness the Honorable A. C. Denison, United States C judge, the Honorable Edward T. Sanford and the Honorable Ross, United States District judges, this the ——— day of 1922.

United States Circuit Ju
EDWARD T. SANFORD.
J. W. ROSS.

Service of a copy of the within citation is hereby admitte acknowledged this 19 day of May, 1922.

WM. H. SWIGGART, JR.,
Solicitors for Appell

103 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Middle District of Tennessee.

I, H. M. Doak, clerk of the District Court of the United S in and for the Middle District of Tennessee, do hereby certify the foregoing is a true, full, and complete transcript of the rec the cause of the State of Tennessee et al. versus United Sta al., No. 88, Equity, as called for in the "praecipt" on appeal on behalf of the United States, and as the same appears and re on file, and of record in my office.

Witness my hand and official seal, this the 2nd day of June, and of the Independence of the United States the 146th year.

[SEAL.] H. M. DOAK,
Cl
By C. T. VESTER,
Deputy Cl

104 *Citation on appeal.*

In U. S. District Court.

UNITED STATES OF AMERICA, *ss:*

To the State of Tennesse; the Railroad and Public Utilities Co sion of Tennessee, composed of B. A. Enloe, Chairman, H H. Hannah, and Julian H. Campbell, Commissioners; an State of Tennessee, on relation of the Railroad and Public Ut Commission of Tennessee, greeting:

You are hereby cited and admonished to be and appear Supreme Court of the United States, at Washington, within t

(30) days from the date hereof pursuant to an appeal duly allowed and filed in the clerk's office of the United States District Court, Middle District of Tennessee, wherein United States of America and Interstate Commerce Commission are appellants and you are appellees, to show cause, if any there be, why the final order or decree annulling and enjoining the order of the Interstate Commerce Commission entered against the appellants in the appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. C. Denison, United States Circuit Judge, the Honorable Edward T. Sanford and the Honorable J. W. Ross, United States District Judges, this 19th day of May, 1922.

A. C. DENISON,
United States Circuit Judge.
EDWARD T. SANFORD,
J. W. ROSS,
United States District Judges.

Service of a copy of the within citation is hereby admitted and acknewledged this 19th day of May, 1922.

WM. H. SWIGGART, JR.,
Solicitor for Appellees.

Pages 105 and 106.

107 In the Supreme Court of the United States,

October term, 1922.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE Commission, appellants, *v.* STATE OF TENNESSEE. } No. 429.

Directions to print.

To WILLIAM R. STANSBURY, Esq., *Clerk:*

The above-entitled appeal will be heard on Monday, April 9, 1923, with No. 396, Nashville, Chattanooga & St. Louis Railway *v.* State of Tennessee, in which the full transcript is printed. With the exception of the appeal papers the transcripts in the two appeals are the same.

In order to prevent duplication in printing, counsel for the parties in each appeal have agreed that the printed transcript in No. 396 may be used for the hearing and disposition of both appeals, with the exception of the following appeal papers in the above-entitled cause, which should be printed:

Petition of United States and Interstate Commerce Commission for appeal.

Assignment of errors.
Order allowing appeal.
Praecipe for record.
Citation.
Certificate of clerk.

The agreement of counsel for the parties is shown by attached copies of the correspondence, which need not be printed.

JAMES M. BECK,
Solicitor General.

MARCH 14, 1923.

(Indorsed on cover:) File No. 28979. D. C., U. S., Middle Tennessee. Term No. 429. The United States, appellant, *vs.* The State of Tennessee, The Railroad and Public Utilities Commission of Tennessee, etc., et al. Filed June 13th, 1922. File No. 28979.

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